

THE BANK OF CALIFORNIA

AGAINST

THE SUTRO TUNNEL.

A SIMPLE STATEMENT OF FACTS.

The first section of the act of Congress, generally referred to as the Sutro Tunnel act, approved July 25, 1866, gives the right of way for the tunnel; the second section provides for the purchase of two sections of land at the mouth of the tunnel, and for such mines as may be discovered; the third section reads as follows:

"SEC. 3. *And be it further enacted*, That all persons, companies, or corporations owning claims or mines on said Comstock Lode, or any other lode drained, benefited, or developed by said tunnel, shall hold their claim subject to the condition (which shall be expressed in any grant they may hereafter obtain from the United States) that they shall contribute and pay to the owners of said tunnel the same rate of charges for drainage, or other benefits derived from said tunnel or its branches, as have been or may hereafter be named in agreements between such owners and the companies representing a majority of the estimated value of said Comstock Lode at the time of the passage of this act."

The amendment offered by the Hon. James S. Negley to Senate bill 16, is intended to carry out the provisions of this last section, which have heretofore been *evaded*, and reads as follows:

"*And provided further*, That all persons, companies, or corporations owning claims or mines on said Comstock Lode shall make application for patents within six months from the date of the passage of this act, and in the absence of a *bona fide* adverse claim during the notice make final proof and payment, and file a receipt for such patents in the same manner as hereinafter provided, within twelve months from the date of filing such application, or if already filed, from the date of the passage of this act, and in default thereof, or in default of filing with the register of the land office at Carson City, in all cases where patents have already been issued, an acknowledgment of the receipt of such patent, subject to the conditions therein contained, within twelve months from the passage of this act, such claims or mines shall be open to relocation by

other parties, in the same manner as if no location of the same had ever been made, always subject, however, to the conditions of the Sutro Tunnel act, approved July twenty-fifth, eighteen hundred and sixty-six."

The last section of the law, it will be seen, clearly provides that all mines on the Comstock Lode *shall be held subject to the condition* that they shall pay certain rates after they shall be benefited by the tunnel. The rates are not named, but are established by reference to a contract entered into by a majority of owners, precisely as they might have been established by reference to a given schedule in some book. In order to make these rates perfectly fair, Congress adopted those named in voluntary contracts previously agreed upon by the parties in interest.

At the time of the passage of this act, the questions involved had been very fully canvassed, and it was held that for the protection of so *gigantic a work* some compulsory law was necessary in order to give the proper security for the investment of capital, in the same manner as such compulsory clauses are found in the mining codes of all civilized nations.

In a debate in Congress, which arose from an attempt by the Bank of California to repeal the Sutro Tunnel act, the Hon. M. C. Kerr spoke as follows:

"This tunnel idea stands upon a very common one in application to various other subjects throughout the country, and it is only by the name that is given to it in Nevada that the people are misled and do not understand just what it means. The country is everywhere familiar with various systems of ordinary sewerage and drainage in cities, towns, and the country. The obvious principles of law, *of just and fair contributions for common advantages and benefits*, on which they are maintained, are well understood. There is no character of monopoly or uncommon hardship about them.

"Now, Mr. Speaker, the whole of this law consists in this simple proposition, that here is to be constructed a sewer, if you please, a drain that will inevitably benefit every owner whose property is in any way reached and drained and ventilated by it. In the city of Washington, and in all the cities of this country, it is a common practice to require the persons who derive advantage from the construction of such works to contribute to their construction originally and to their maintenance thereafter. * * *

In addition to what I have said, I desire to call attention to a further fact, that under the law which it is now desired to repeal, and under the contract which that law adopts, not one of these mining companies or individual miners is required to *pay one farthing to this tunnel company* in the way of royalty or anything else until the tunnel shall have been constructed and they shall have begun to *derive advantage from it*. In other words, the entire obligation is strictly reciprocal; its burdens and its benefits go together; they run constantly and perpetually in parallel

lines. And the whole assumption, therefore, that there is oppression or injustice or monopoly in this matter strikes me as being very far-fetched and purely unfounded."

The necessity of compulsory laws in cases of mining tunnels is much stronger than it is in the case of sewers in cities; for if a mining tunnel reaches under the different mines they will derive the benefits of drainage and ventilation without making fair contributions for the advantages derived, if they are not by law compelled to make such contributions.

The Sutro Tunnel act is the first law on the statute books granting a mining privilege in the United States. up to that time all mining claims were held at mere sufferance, to which the Hon. M. C. Kerr refers as follows:

"But it is very clear, Mr. Speaker, that while gentlemen say here that these people had a possessory right in this soil before this last law was passed, they utterly destroy the value that is in that position when they also say that the mines involved in this legislation have very great value, and that out of these mines these same miners have already extracted \$100,000,000 in precious metals. Now, if that be so, it seems to me that for that *shadowy, that unreal, that executory—it is not that much in law—that mere possessory claim of right*, they have been most munificently paid, and ought not to come back here and ask for more. But a further answer to their position is found in the fact that, when the original application to Congress was made, these miners themselves went to work and executed these *voluntary* individual contracts with this tunnel company, by which they agreed, whenever the tunnel was constructed, to contribute these several sums to aid its construction and maintenance."

The Hon. Orange Ferris, referring to the same question, said:

"The gentleman from Nevada [Mr. Fitch] talked about the right which the owners of these mines have acquired. Up to the passage of the Sutro tunnel act, as it is called, the third section of which gives a royalty to the constructors of the tunnel in case they drain the mines—up to that time there was no law upon the statute book which gave any man in this country a right to one single foot of mining land, with the exception of a small quantity of lands in California, the right to which was acquired under the Mexican title, so called. In all other cases every occupier of every foot of the mineral lands was merely a squatter. All the title he had was a mere license, a mere privilege granted by the Government.

"Well, sir, that was the condition of things when this Sutro tunnel bill was passed. It was passed on the 25th of July, 1866, and the day following we passed the first law that was passed by Congress giving anybody a right to acquire title to a foot of this land; so that at the time that the Sutro tunnel law was passed, which was one day previous to the passage of the general mining law, as it is called, Congress held every foot of mining land, and could impose just such conditions as it saw proper upon parties acquiring title to those mines. The Government owned the mines, and these parties were mere squatters, and were occupying the lands by the allowance of the Government."

Thus it will be seen that Congress had clearly the right to impose just such a tax; and in order that there should be no *evasion* of the law, the third section also provides that its conditions should be expressed in all patents.

In pursuance of the statute, all patents issued by the United States for mines on the Comstock Lode contain the following provision, which is *printed* in all the blanks which are specially provided for this purpose:

"That the claim hereby granted and conveyed shall be subject to the conditions specified in the third section of the act of Congress approved July 25, 1866, granting the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada, and the grantee herein *shall contribute and pay* to the owners of the tunnel constructed pursuant to said act, for *drainage* or other *benefits* derived from said tunnel or its branches, the same rate of charges as have been or may hereafter be named in agreement between such owners and the companies representing a majority of the estimated value of said Comstock lode at the time of the passage of said act, as provided in said third section."

This is the provision *contained in all patents*, from which these parties *want to escape*, and from which they would have escaped had Senate bill 16, without amendment, become a law, and allowed them to make "all *proceedings* for patents so had by such applicants *void and without effect*."

Nearly all the principal mining companies made their *applications* for patents immediately after the passage of the general mining act, over six years ago. They were *then* willing to accept their patents, subject to the conditions therein contained.

At that time the war by the Bank of California against the Sutro Tunnel had not yet been commenced. At that time they could see nothing but four miles of solid rock and enormous difficulties in the way. But when they found from the publications on the subject by the projector that the tunnel would also furnish a cheaper mode of transportation, and for the reduction of ores; when they had read the memorial of the Nevada Legislature, setting forth, in the most convincing argument, that this was a great *national work* of immense benefit to the whole country in a financial view, and as a contribution to science, by establishing practically the downward continuation of mineral lodes; when they saw that Congress could hardly refuse

aid to this great work; they then came to the conclusion that the tunnel would be of more importance than they had at first supposed, and if Congress was to give aid, that *they, the California Bank ring, should have it*; and in order to accomplish this, they determined to break it up in the hands of its projectors. The war then commenced, and it has been one *unprecedented* in the annals of enterprises in this or any other country.

These parties commenced to vilify the projector and the undertaking itself. They declared him insane, and the project chimerical. They made the mining companies, who had subscribed to the stock of the tunnel company to the extent of \$600,000, repudiate their subscriptions. They made the same companies contribute this identical sum to the construction of a railway from Virginia City to Carson river, which they now claim will be ruined by the completion of the tunnel. They first robbed us, and then charged us with being poor. They next invested the money taken from us in this railroad, and now complain that the completion of the tunnel will curtail the profits of the railroad!

Congress granted no aid to our great work, owing to the machinations of the enemy. Now that we *do not ask any aid*, these parties want to injure us by underhanded legislation, so *our credit may be destroyed*.

Senate bill 16, containing a provision concocted with satanic ingenuity, passed the Senate while these parties knew I was absent in Europe. It was intended as the assassin's stab in the dark. Fortunately I returned in time to discover the iniquity, which was not understood by my best friends, none of whom, though able lawyers, could see the scope of that bill until it was pointed out.

The Hon. James S. Negley's amendment simply carries out the intention of the law. These parties are made to accept patents and file receipts within twelve months.

The principal mining companies on the Comstock Lode number thirty. Of this number twenty-two have made applications. Of these, again, seven patents have been delivered, though the duplicate receipts have been *stolen*.

from the register's office at Carson City. Seven are now lying in the register's office. The others are still pending in the General Land Office.

The assertion that the passage of this amendment interferes with the rights of the parties in court is not based upon any fact. No suit can be commenced until a demand is made upon the mining companies, and that cannot be made until the tunnel shall be completed—a task of more than three years; and if there be any suit then, it will be brought by the Sutro Tunnel Company, upon a refusal by these parties to pay.

No suit whatever has been commenced, and none can be that could be sustained.

The statement that our contract with the mining companies has been forfeited has no bearing upon the question now pending. We claim under the *vested rights* granted us by a law of Congress which these parties have been striving to set aside.

As far as the contract, however, is concerned, should we ever choose to make any claims under its terms, it will be a question the courts can determine; it will be one of judicial arbitrament. This matter was fully explained in the former controversy in Congress, in which Judge Woodward, of Pennsylvania, remarked:

"Well, sir, yesterday we had an extraordinary spectacle on this floor, when the only Representative of the State of Nevada (Mr. Fitch, the predecessor of the Hon. Charles W. Kendall) denounced that legislation in the most violent manner as improper and dishonest. The act of 1866 looked to the commencement of the *greatest work of internal improvement that has ever been contemplated in the State of Nevada*. It was legislation which was calculated to develop her mineral resources to a greater extent than anything else that has been proposed. This legislation was yesterday denounced on this floor by the Representative of the State of Nevada as dishonest and corrupt. Now, Mr. Speaker, I say that my eloquent friend from Nevada, in opposing this bill, manifestly does not represent the State of Nevada. He says that he does not represent the 'bank ring.' I do not know that anybody charges him with doing so. But he does not represent the State of Nevada, or else the documents which we had before our committee for a whole year were forgeries.

"They complain, through their Representative upon this floor, that Mr. Sutro did not commence his work in time. I say, when that question gets into the courts and becomes a judicial question, these other facts will bear on this question; and the judge or chancellor will ask, if time is the essence of the contract, the other party, 'How have you treated that question?' If it be found that they have thrown obstructions in the way of Mr. Sutro, prejudiced the money market against him, and embarrassed him at every

step of his progress, the equity of this special technical defense will not be very impressive. There is not much in that. If this House is going to legislate on this judicial question, I insist on it that these questions of fact which the gentleman intimates I have not stated correctly, bearing on the question whether time be the essence of the contract, shall be investigated by the House; that we shall go into them in order to act intelligently on this judicial question."

Mr. Biggs, of Delaware, made the following remarks:

"Mr. Speaker, as a member of the Committee on Mines and Mining, I have given the bill which is now before the House some reflection, and I have come to the conclusion, with eight of my colleagues on that committee, that the bill (to repeal the Sutro Tunnel act) ought not to pass. Only one member of the committee can be found to advocate its passage. It is true that the judgment of the eight members of the committee may perhaps be at fault; but I think if the House will carefully investigate the subject they will come to the conclusion that the bill is an outrage upon the rights of Mr. Sutro and his company.

"One idea advanced here yesterday by the gentleman from Nevada [Mr. FRENCH] I must confess struck me as rather strange, and that was that the Congress of the United States have permitted this humble individual to pass upon them an act of fraud. Sir, Mr. Sutro, in every effort which he undertook from the 4th day of February, 1865, until 1867, had the sanction and support of the people of the State of Nevada and its Representatives in Congress. Each and every one of them supported him in the measure, which he succeeded in by the passage of the bill of July, 1866. But it was urged yesterday by the honorable gentleman from California [Mr. SARGENT] that Sutro had not lived up to his contract. Mr. Speaker, why did he not? Because a most determined opposition had suddenly sprung up on the Pacific coast against Mr. Sutro and his tunnel company. His prospects for success were so flattering that the mining companies became alarmed, and publicly repudiated their former subscriptions to the Sutro Tunnel Company. In July, 1867, the Savage Mining Company repudiated their subscription to the Sutro Tunnel Company, and the Bank of California, through their agents in New York city, Messrs. Lees & Waller, placarded in their office the following:

"That the stockholders of the Savage Company, at their annual meeting, had refused to ratify the subscription made by their trustees of \$150,000 to the stock of the Sutro Tunnel Company, and that the same was utterly null and void."

"Here, then, we see one of the leading mining companies repudiating a subscription which they had made in good faith, the effect of which was to throw a damper upon the whole enterprise. But this company was not alone, for on the 15th day of January, 1868, was sent to Washington the following telegram:

"VIRGINIA, NEVADA, January 15, 1868.

"Received at Willard's Hotel, Washington, D. C., January 16, 1868.

"To Hon. WILLIAM M. STEWART and JAMES W. NYE:

"We are opposed to the Sutro tunnel project, and desire it defeated, if possible.

WILLIAM SHARON,

The Agent of the Bank of California.

CHARLES BONNER,

Superintendent of the Savage Company.

B. F. SHERWOOD,

President of the Central Company.

JOHN B. WINTERS,

President of the Yellow Jacket Company.

JOHN P. JONES,

Superintendent of the Kentuck Company.

J. W. MACKEY,

Superintendent of the Bullion Company.

THOMAS G. TAYLOR,

President of the Alpha and Superintendent of the Crown

Point and Best and Belcher Companies.

F. A. TRITTLE,

President of the Belcher Company.

ISAAC L. REQUA,

Superintendent of the Chollar Potosi Company."

"Now we see, sir, the very superintendents of the mining companies who had subscribed, together with private individuals, the aggregate sum of \$600,000 towards the construction of this tunnel telegraph to the Senators from Nevada that they are opposed to the Sutro tunnel, that they want it defeated, and that they repudiate their subscriptions. How, then, could Mr. Sutro go on with his tunnel? He was not a man possessed of great fortune. He had raised the amount of \$600,000, and these very identical men who had subscribed for the purpose of constructing the tunnel turned round and telegraphed to Senators STEWART and NYE—the former of whom was actually in 1865 the president of the Sutro Tunnel Company—that they did not want the tunnel, and wished it defeated."

The contracts are not affected in the slightest manner by the passage of the pending amendment. The law of Congress gives certain independent rights. In regard to this Judge Strickland said:

"The minority report now under consideration assumes that this legislation changed contracts entered into by the mining companies on the one part and this man Sutro and his assigns on the other part. Now, sir, from this conclusion I entirely differ, as does the committee to which the subject was referred. These contracts *remain intact in every part*. They are not infringed in the least. No right secured by the contracts to the miners is infringed in any way. They are there with all the rights they ever had. They have the same privileges given to them by the terms of the contracts, just as though this legislation had never been enacted."

Should the question ever get into law, the courts will never decide that the contracts have been forfeited. The only point which can be made is that the work was commenced a year too late. In the face of the fact that every possible obstacle was thrown in the way, that plea will have but little weight, when it is considered that *time* was *not* the essence of the contract.

Judge Ferris, in referring to that plea, said:

"By the terms of that contract Mr. Sutro has yet over twelve years, providing the work does not cost over \$3,000,000, as supposed at the time the contracts were made to complete the work. This contract requires that he shall expend \$400,000 the first year, and thereafter \$200,000 a year at least. Thus, sir, if it costs \$3,000,000, will give him fourteen years to build the tunnel; and if it costs \$6,000,000, which is more likely, will give him twenty-eight years. Yet gentlemen talk about time being the essence of this contract! The purpose of the repeal of the Sutro tunnel act—I call it repeal because the effect of the act 'to repeal and modify' is practically to repeal the section indicated—is *to drive this man away from the franchise granted him by law*, now that he has commenced in good faith this important work. As soon as these men see that the work is going on, when they see that the work is progressing, when they see that a valuable lode may be struck by the tunnel long before it reaches the Comstock lode, when they see the probability that capitalists will invest their money, they say to Congress that we shall stop this work *which Congress authorized at their request*. The character of this man, Sutro, has been impugned upon this floor. I respectfully submit no gentleman who has been so long about Congress as he has conducted himself with more propriety than Mr. Sutro.

"Repeal this law, strike out this section—they call it explanatory—and it is taking the heart out of it; it is leaving nothing but the empty carcass. Repeal it at once, and what do you find? Why, sir, the gentleman from California has told us in his minority report that when the owners of the mines desire them to be drained they will do it, and that, too, without any law of Congress. Ah! does the gentleman suppose that they can build that tunnel and get the right of way without a law of Congress? Perhaps they may do those things over in California. Under all other circumstances, unless the power of the nation is thrown on their side, *the power of corporations is so great and so overshadowing that poor and humble individuals have to give way before them.*"

The simple truth of the matter is, we have expended more money than we were compelled to expend under the contracts, had we commenced before August 1, 1868; that is to say, we should have expended by this time \$1,400,000, while our expenditures amount already to over \$2,000,000.

The law of Congress, however, gives us certain rights which these parties have repeatedly attempted to take from us. General Negley's amendment will stop these attempts forever, and will, at the same time, give protection to all the small claimants in the neighborhood of the Comstock Lode.

The whole power of which that gigantic *corporation*, the Bank of California, is possessed will now be brought to bear against the amended bill. Gentlemen who have never visited the Pacific have no conception of the thralldom under which the people in that, the fairest part of the United States, are groaning, and of the power exercised by that *monstrous monopoly*.

The Hon. Austin Blair, of Michigan, on the floor of the House of Representatives, made use of the following language:

"The gentlemen whose name has been mentioned in this discussion, Mr. William Sharon, the agent of the Bank of California at the Comstock Lode, took me in his buggy and carried me to his crushing mills, and showed me the line of the new railroad he was building, or rather had got the people to build for him. He took me to his mines, to the very bottom of them; showed me all about them, and told me *he was determined this Sutro Tunnel business should be stopped.*

"Now, sir, I will say to the gentleman that while I do not wish to arraign anybody here at all; while I received, as we all did, such courtesies from the Bank of California or its agents that it might be supposed our mouths might be pretty much shut against saying what perhaps ought to be said on this subject, yet all that occurred there did not blind our eyes to the fact that *this is the most gigantic monopoly in the United States*, that it dominates the whole Pacific coast, and that when it pipes in that country

the people dance. And you may rest assured that that will be the case so long as that monopoly continues. It had power enough to thrust out your greenback currency from the entire coast. Not a dollar of it can be there used to-day in the ordinary business transactions of life, and it is owing to the immense power of the Bank of California that the Government has not been able to introduce it. The agents of the Government have informed me that they have tried diligently to introduce the legal tender notes, but the bank had given its customers notice that if they undertook to deal in greenbacks they would not have the favor of the bank. The result was that they broke down everybody who undertook to do it; and to-day your currency is virtually excluded from the whole Pacific coast just because the *Bank of California* was determined that it should not circulate there.

"Sir, this bank has waved its hand over the Comstock Lode and ordered Sutro away. That is the whole of this transaction, as it seems to me."

This is the overwhelming power which is used against this enterprise and the best interests of the laboring people, who pray for its completion.

The Hon. Wm. D. Kelley, of Pennsylvania, feelingly referred to the workingmen in these words:

"Gentlemen on the other side have spoken for the owners of mines. I propose to speak for the miners, the men who, with pick and shovel, extract the ore, and forty-five per cent. of whom die of miners' consumption, which seizes them and penetrates their vitals before they are admonished of its approach, and who die in their youth, or in the vigor of their young manhood, prostrated by the heat and poisoned by the atmosphere of these mines. These industrious men are subscribing to stock in the Sutro Tunnel Company. *They swarm behind Mr. Sutro, and beg Congress to vest all the rights in him that will enable him to redeem them from the terrible doom to which the so-called miners' friends would still condemn them.*

"Sir, I brought with me from one of these mines a bit of blackened ore, blackened by the smoke of a fire that smothered and burned forty-five of these men in the mine. Had there been a tunnel such as Mr. Sutro is constructing, they would have been breathing pure air while at work; and though the lumber of the mine might have been burned, the miners could have dropped below the fire and escaped."

Single-handed I have for years had to contend against the power of this vast *corporation*. Unceasing have been its efforts to destroy the great work to which I have devoted my life, and I ask now, in behalf of the miners and laboring men of our State; I ask in behalf of all the people of the United States, who are deeply interested in the production of the precious metals; I ask in behalf of science, to which these explorations will give valuable contributions; I ask in behalf of the *honor* and *good faith* of the American nation, that this amendment may become the law of the land, so we may have that protection to which we are entitled, and so that the completion of that great work may be secured, to which the Hon. Mr. Strickland, on the floor

of the House of Representatives, in his closing remarks, referred to as follows:

"The undertaking is a gigantic one, I confess; it is such a tunnel as the world has never yet known. And if it shall bore that mountain for six miles two thousand feet below the surface, revealing an amount of wealth which was never brought to light in this country before, it may well be considered a gigantic project; and it will be very unjust in my judgment—and I trust the judgment of the House will also so determine—to stop this project in its incipient stages, when it is but commenced, by giving these parties the power to destroy it; to destroy an undertaking *the most magnificent of any now in progress on this continent.*"

Respectfully submitted.

ADOLPH SUTRO.

WASHINGTON, D. C., *March 31, 1874.*

